82-973

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PREDRAG STEVIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 4a-25a) is reported at 678 F.2d 401. The order of the court of appeals denying rehearing (App. A, *infra*, 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (App. D, *infra*, 27a-31a; App. E, *infra*, 32a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 26a) was entered on May 5, 1982, and a peti-

tion for rehearing was denied on July 29, 1982 (App. A, *infra*, 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp. V) 1253(h)(1) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 32-year old native and citizen of Yugoslavia. He entered the United States on June 8, 1976, as a nonimmigrant visitor authorized to remain until July 25, 1976. Because he stayed in this country beyond that date without permission, deportation proceedings were instituted against him in November 1976. At the deportation hearing, respondent admitted deportability and requested and was granted the privilege of voluntarily departing the United States by February 16, 1977. Respondent designated Yugoslavia as the country to which he wished to be deported. App. B, *infra*, 5a-6a; R. 179, 182, 184-185.[1]

Respondent did not leave this country by February 16, 1977. Rather, in January 1977, he married a

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[1] "R." refers to the certified administrative record in the court of appeals.

United States citizen, who filed a visa petition on his behalf. The Immigration and Naturalization Service approved the visa petition on April 5, 1977. Five days later, however, respondent's wife was killed in an automobile accident, which automatically revoked the INS' approval of the visa petition. See 8 C.F.R. 205.1(a)(2). Respondent requested the district director of the INS to reinstate the approval, but that request was denied on August 11, 1977, and respondent was ordered to surrender for deportation. App. B, *infra*, 6a-7a; R. 159-160.

2. Instead of surrendering or seeking review of the district director's decision, respondent moved to reopen his deportation proceedings in order to apply for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h).[2] Respondent alleged that he feared persecution and imprisonment if he were returned to Yugoslavia because of his friendship with members of, and assistance in the work of, Ravna Gora, an anticommunist organization, and because his father-in-law, who was a member of Ravna Gora, had been imprisoned in Yugoslavia on account of his anticommunist activities when he visited there as a tourist in 1974. Respondent submitted his affidavit in support

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[2] In 1977, when respondent filed his first motion to reopen, 8 U.S.C. 1253(h) provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

The section was amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.* See pages 17-18 & note 19, *infra*.

of these allegations. App. B, *infra*, 7a-8a; R. 156.[3] Respondent explained that he had not requested withholding of deportation at his deportation hearing, and had designated Yugoslavia as the country to which he wished to be deported at that time, because he had not become involved in anticommunist activities until after his marriage, which occurred after he had been found deportable.[4]

On October 17, 1979, an immigration judge denied respondent's motion to reopen his deportation proceedings. Characterizing respondent's affidavit as self-serving and conclusory, the judge held that respondent had failed to provide any substantial evidence that he would be subjected to persecution in Yugoslavia. App. B, *infra*, 8a; R. 150-152.

On January 18, 1980, the Board of Immigration Appeals dismissed respondent's appeal from the immigration judge's decision and denied respondent's motion to reopen (App. E, *infra*, 32a-36a). The Board noted (*id.* at 34a-35a) that "[a] motion to reopen based on a section 243(h) claim of persecution

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[3] While his motion to reopen was pending before the immigration judge, respondent also applied to the district director for asylum. The district director denied respondent's application on August 1, 1979 (App. B, *infra*, 8a).

[4] This explanation is not wholly convincing. Respondent subsequently testified that he knew his late wife for six months prior to their marriage in January 1977. Transcript of July 27, 1981 proceedings on respondent's habeas corpus petition, at 42. Accordingly, respondent is likely to have been aware of the circumstances surrounding his future father-in-law's imprisonment in Yugoslavia when he designated that country as the country to which he wished to be deported during his December 1976 deportation proceedings. Nevertheless, respondent did not mention his future wife or her father during his deportation hearing. See R. 176-183.

must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual [alien]." It concluded that respondent had failed to make the required showing because evidence of his membership in Ravna Gora, his father-in-law's incarceration in Yugoslavia, and the conviction in Yugoslavia of an unrelated American citizen associated with an anticommunist organization did not prove that respondent himself would be singled out for persecution if he returned to Yugoslavia. App. E, *infra*, 35a-36a.[5] Respondent did not seek review of this decision of the Board.

3. In February 1981, the INS again ordered respondent to surrender for deportation. Once again, respondent neither complied nor sought an extension of time. He was arrested by INS officers in Chicago on July 17, 1981, and flown to New York for deportation. While awaiting a connecting flight to Yugoslavia, respondent attempted to escape. Accordingly, he was detained by the INS and his deportation was rescheduled. App. B, *infra*, 8a-9a.

On July 21, 1981, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The district court limited its review to the question whether the district director had abused his discretion by refusing to reinstate approval of the visa petition

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[5] On appeal to the Board of Immigration Appeals, respondent presented a newspaper clipping that reported that another Yugoslav, an American citizen unrelated to respondent, had been sentenced to five years' imprisonment in Yugoslavia. Respondent also submitted a copy of the oath of allegiance that he had taken when he joined an anticommunist organization in February 1977, and a declaration in which he stated his reasons for joining the organization. App. D, *infra*, 28a-29a; R. 148-149.

filed by respondent's late wife on his behalf. The district court concluded there had been no abuse of discretion and denied respondent's petition. App. B, *infra*, 9a.

While detained by the INS, respondent also filed a second motion to reopen his deportation proceedings in order to renew his request for withholding of deportation under Section 243(h). On September 3, 1981, the Board denied respondent's motion (App. D, *infra*, 27a-31a).[6] The Board observed that although the basis for respondent's second motion to reopen—that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization—was identical to that of his prior motion to reopen, respondent had made no showing that the evidence submitted in support of his second motion was unavailable to him and could not have been discovered or presented at a former hearing or that conditions in Yugoslavia had changed substantially since the earlier motion (*id.* at 30a). See 8 C.F.R. 3.2; *Kashani* v. *INS*, 547 F.2d 376, 380 (7th Cir. 1977).[7]

In addition, the Board held that respondent had failed to make a prima facie showing that he would be singled out for persecution if he were deported to Yugoslavia. App. D, *infra*, 31a. The Board noted

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[6] A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5 and 242.22. However, where, as here, the deportation order has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2 and 3.8.

[7] In support of respondent's second motion to reopen, he submitted various articles describing the political conditions in Yugoslavia in general and several affidavits of individual Yugoslavs who averred that respondent would be imprisoned if he returned to Yugoslavia. R. 27-139.

(*ibid.*) that "[a] motion to reopen based upon a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual." The Board concluded that respondent had failed to make the required showing because the journalistic articles submitted by respondent (see note 7, *supra*) were "of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to respondent," and the affidavits and petitions submitted by individual Yugoslavs (see *ibid.*) "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia." App. D, *infra*, 31a.[8]

4. In a consolidated proceeding in the court of appeals, respondent appealed the district court's denial of his habeas petition and sought review of the Board's most recent denial of his motion to reopen. The court of appeals upheld the district court's denial of respondent's petition (App. B, *infra*, 10a-11a). However, it reversed the Board's denial of respondent's motion to reopen, concluding that the Board had applied too stringent a standard in evaluating respondent's claim of persecution in support of his request for withholding of deportation (*id.* at 11a-25a).

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[8] Respondent also had claimed that if he returned to his home town, Gnjilane, Yugoslavia, he, as a Serbian, would be killed by the Albanians, who constituted a majority in the province and were attempting to secede from Yugoslavia. The Board rejected this claim as well, finding that "there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to [a] country, not a city or province." App. D, *infra*, 31a.

While acknowledging that "the matter is hardly free from doubt" (App. B, *infra*, 12a), the court of appeals held that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, represented the culmination of a process, which had begun with the United States' accession in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 *et seq.*, T.I.A.S. No. 6577, of modifying the standard applicable to requests for relief under Section 243(h). App. B, *infra*, 21a. In the court's view (*id.* at 14a), the " 'well-founded fear of persecution' " language contained in the Protocol "seems considerably more generous than the 'clear probability' test applied under Section 243(h)." Accordingly, without providing any additional guidance concerning the content of the new standard,[9] the court concluded (App. B, *infra*, 23a) that "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution." It remanded the case to the Board for a "plenary hearing under the legal standards established by the Protocol." App. B, *infra*, 25a (footnote omitted); App. C, *infra*, 26a.

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[9] The court expressly left the formulation of an appropriate standard for development on an ad hoc case-by-case basis (App. B, *infra*, 24a):

> It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by traditional indices of legislative intent, by the [Office of the United Nations High Commissioner for Refugees,] *Handbook [on Procedures and Criteria for Determining Refugee Status* (Geneva 1979)] and by experience.

REASONS FOR GRANTING THE PETITION

The decision below squarely conflicts with a recent decision of another court of appeals concerning the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation. In *Rejaie* v. *INS*, 691 F.2d 139 (1982) (App. F, *infra*, 37a-54a), the Third Circuit correctly held that neither the United States' accession to the United Nations Protocol in 1968 nor the enactment of the Refugee Act of 1980 altered the standard applicable to claims for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1253(h). Shortly thereafter, the Sixth Circuit rendered a decision adopting the position of the court below, without even alluding to the Third Circuit's decision to the contrary.

Resolution of the question on which these courts of appeals have differed is essential, in view of the need for a uniform application of the Nation's immigration laws. In addition, the decision below, if permitted to stand, will impose a substantial administrative burden on the Board and the INS. The court of appeals' ruling renders the more than 9,000 applications for asylum or withholding of deportation that have been denied since the passage of the Refugee Act of 1980 subject to challenge on motions to reopen and clouds the adjudication of the thousands of such cases now undergoing initial administrative review.[10]

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[10] Withholding of deportation relief under Section 243(h) simply prohibits the government from returning the alien to the country of persecution, whereas an alien who is granted asylum and thereafter is physically present in this country for one year is eligible to apply for permanent resident status. See 8 U.S.C. (Supp. V) 1159(b). Although

1. There is a clear conflict among the courts of appeals concerning the question presented by this case. In *Rejaie* v. *INS*, 691 F.2d 139 (1982) (App. F, *infra*, 37a-54a), the Third Circuit held that there is no practical difference between the phrases "clear probability of persecution" and "well-founded fear of persecution" and therefore that the standard applicable to claims for withholding of deportation under Section 243(h) was not affected by the United States' accession to the Protocol in 1968 or the passage of the Refugee Act of 1980. App. F, *infra*, 45a-50a. In so holding, the court expressly rejected the reasoning, as well as the conclusion, of the Second Circuit in this case. *Id.* at 50a-54a.[11]

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asylum relief is discretionary under the Refugee Act of 1980, whereas withholding relief under Section 243(h) is mandatory for an eligible alien, the standards for eligibility for the two types of relief are identical. See *In re McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980), petition for review granted on other grounds, 658 F.2d 1312 (9th Cir. 1981); 8 U.S.C. (Supp. V) 1158(a); 8 C.F.R. 208.5. In addition, asylum requests that are filed with the immigration court "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act." 8 C.F.R. 208.3(b). Accordingly, the decision in this case will govern applications for asylum as well as requests for withholding under Section 243(h).

[11] In particular, the Third Circuit identified the following errors made by the court below (App. F, *infra*, 52a):

> First, it attributed a stringency to the phrase "clear probability" that was not consistent with its own observation in *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), that, under the "clear probability" standard, "[i]n order to forestall deportation the aliens must show some evidence indicating they would be subject to persecution," a formulation that closely approximates the [*In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973)] definition of

One month later, the Sixth Circuit, in a pe. curiam opinion containing virtually no analysis, adopted the position espoused by the court below. In *Reyes* v. *INS*, No. 81-3157 (Nov. 18, 1982), slip op. 4, the court quoted from the Second Circuit's decision and concluded:

> Since the Board applied the more stringent clear-probability test, the holding cannot stand. It is admitted that there is some evidence that Reyes may be subject to persecution. All the Board held was that she had not shown, by a clear probability, that she would specifically be subject to it. Since something less than that showing is now required, we find that the Board erred.[12]

Thus, the courts of appeals are in disagreement concerning the standard an alien must meet in order to avoid deportation under Section 243(h). In view of the significant consequences of the determination of a withholding of deportation or asylum claim, that determination should not depend upon the circuit in which the applicant is located. Accordingly, this Court should resolve the conflict.

2. The decision below, if permitted to stand, will impose a substantial administrative burden on the

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"well founded fear" as "realistic likelihood of persecution." 14 I. & N. Dec. at 319. Second, the court failed to appreciate the caselaw consensus, discussed *supra*, that the two standards were equivalent. Third, the court apparently misapprehended the legislative history of the 1968 accession to the Protocol and of the Refugee Act.

[12] *Rejaie* v. *INS*, *supra*, was rendered subsequent to oral argument in *Reyes*, but prior to the decision in that case. Although the INS supplied the Sixth Circuit with a copy of the *Rejaie* decision, that court's opinion does not mention the Third Circuit's ruling.

Board and the Service. The INS estimates that, since the enactment of the Refugee Act of 1980, more than 9,000 applications for asylum or withholding of deportation have been denied. The court of appeals' decision, which holds that the wrong standard was applied in evaluating the evidence of persecution presented in those cases, renders all of them subject to attack on motions to reopen. To be sure, not all of these applications were made in the Second Circuit. Nevertheless, as the Sixth Circuit's decision in *Reyes* makes abundantly clear, the impact of the decision below will not be limited to the Second Circuit. Rather, aliens nationwide, anxious to remain in this country by any means possible, can be expected to seize on the decision below in an attempt, at the least, to delay their inevitable deportation. Indeed, we are advised that the bulk of the asylum and withholding applications now before the Board contain requests for a remand or reconsideration in view of the decision below.[13]

Moreover, the court of appeals' decision clouds the adjudication of the thousands of withholding and asylum cases that are currently undergoing initial administrative evaluation and review.[14] So long as the standard for assessing these claims remains unresolved, the number of cases that may require reconsideration in the future will continue to increase.

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[13] The Board of Immigration Appeals estimates that in fiscal year 1980 it addressed 150 asylum or withholding of deportation issues; in FY 1981 it addressed more than 400 such issues; and in FY 1982 it addressed nearly 550.

[14] There are more than 120,000 applications for asylum pending before INS district directors and more than 12,000 asylum/withholding applications pending before immigration judges.

These administrative problems are exacerbated by the fact that the Second Circuit struck down the "clear probability" standard but refused to provide any guidance concerning what it would consider to be an appropriate standard (see page 8 & note 9, *supra*). Thus, even if the Board and the INS should reconsider and evaluate all post-Refugee Act claims in view of the decision below, there is no assurance that such an attempt, applying "a more generous standard than the 'clear probability' test" (App. B, *infra*, 15a), would satisfy the Second Circuit. In these circumstances, this Court's intervention is necessary in order to enable the government to administer the immigration laws efficiently and fairly.

3. Finally, the decision below is manifestly incorrect. The alien has always had the burden of proving eligibility for withholding of deportation on the ground that he would be subject to political persecution in the country of deportation.[15] Specifically, both the courts and the Board have held that an alien is entitled to relief under Section 243(h) only if he can "prove that there is a clear probability that he will be subjected to persecution if deported." *Rosa* v. *INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Shkukani* v. *INS*, 435 F.2d 1378, 1380 (8th Cir.), cert. denied, 403 U.S. 920 (1971); *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena* v. *INS*, 379 F.2d 536, 538 (7th Cir. 1967). Hence, an alien is required to show by objective evi-

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[15] 8 C.F.R. 242.17(c) provides in pertinent part:

> The [alien] has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

See also 8 C.F.R. 208.5.

dence that he is somehow different from others of his nationality who reside in his native land and that he would be singled out for persecution if returned there. See *In re Surzycki*, 13 I. & N. Dec. 261, 262-263 (BIA 1969); *In re Joseph*, 13 I. & N. Dec. 70, 71-72 (BIA 1968).[16] The history of both the United States' accession to the United Nations Protocol and the enactment of the Refugee Act of 1980 makes clear that Congress intended neither of those events to alter this standard.

a. In 1968, the Senate gave its advice and consent to the United States' accession to the Protocol, thereby agreeing that this country would not return a "refugee," defined as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," to the country of persecution.[17]

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[16] Contrary to the suggestion of the court below (App. B, *infra*, 15a-16a), the "clear probability" test was first enunciated by the courts (see *Lena* v. *INS*, *supra*), not by the BIA.

[17] The Protocol provides that all parties to it will undertake to apply Articles 2 through 34 of the 1951 Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See 19 U.S.T. 6225. (The United States is not a party to the Convention itself.) Article 33.1 of the Convention provides (19 U.S.T. 6276) that "[n]o Contracting State shall expel or return * * * a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Article 1 of the Convention, as modified by the Protocol, defines a "refugee" as one who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and

The Senate action was based on the express understanding that accession to the Protocol would neither alter nor enlarge the substance of our immigration laws; rather, accession to the Protocol was intended as a symbol and as encouragement to other nations to treat refugees within their borders in the same salutary manner in which the United States already dealt with those within its territory. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4, 6, 7, 10 (1968); S. Exec. Doc. K. 90th Cong., 2d Sess. III, VIII (1968). Specifically, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of State, assured the Senate Foreign Relations Committee that

> accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees. * * * The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with [the asylum concept set forth in the Protocol]. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

S. Exec. Rep. No. 14, *supra*, at 6. In addition, the President and the Secretary of State advised that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." S. Exec. Doc. K, *supra*, at III, VII.

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being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

See 19 U.S.T. 6261.

In view of this unequivocal evidence of legislative intent, both the courts and the Board have held that the "well-founded fear" language contained in the Protocol represented no change from the preexisting "clear probability" formulation. See *Kashani* v. *INS*, 547 F.2d 376, 379 (7th Cir. 1977); *In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973). See also *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated and remanded on other grounds, 434 U.S. 962 (1977); *Ming* v. *Marks*, 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974). Indeed, between 1968 and 1980 the phrases "clear probability of persecution" and "well-founded fear of persecution" were used interchangeably to describe the objective showing required of an alien seeking withholding of deportation under Section 243(h).[18]

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[18] See *Fleurinor* v. *INS*, 585 F.2d 129, 132, 134 (5th Cir. 1978) ("well-founded fear" used by immigration judge; "probable persecution" used by court); *Martineau* v. *INS*, 556 F.2d 306, 307 (5th Cir. 1977) ("clear probability" and "'well-founded fear'"); *Henry* v. *INS*, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution" and "reason to fear persecution"); *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) ("well-founded fear"); *Kashani* v. *INS*, *supra*, 547 F.2d at 378-379 ("well-founded fear" and "clear probability"); *Zamora* v. *INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) ("likelihood of persecution" used by court; "'well-founded fear'" used by Board); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 159 (3d Cir.), cert. denied, 429 U.S. 853 (1976) ("clear probability"); *Daniel* v. *INS*, 528 F.2d 1278, 1279 (5th Cir. 1976) ("probability of persecution"); *Paul* v. *INS*, 521 F.2d 194, 200 n.11 (5th Cir. 1975) ("'well-founded'" fear of persecution used by Board); *In re Williams*, 16 I. & N. Dec. 697, 700-701 (BIA 1979) ("well-founded fear," "probable persecution" and "likelihood of persecution"); *In re Chumpitazi*, 16 I. & N. Dec. 629, 633 (BIA 1978) ("well-founded fear" and "clear probability"); *In re*

b. The legislative history of the Refugee Act of 1980 makes equally clear that that legislation also was not intended to alter the standard applicable to requests for withholding of deportation under Section 243(h). The Act first defines the term "refugee," for purposes of the Immigration and Nationality Act, to include "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *." 8 U.S.C. (Supp. V) 1101(42)(A). Both the House and Senate reports indicate that this definition was included simply to conform the language of the Act to that of the Protocol. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 9 (1979); S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979).

The Refugee Act also modified Section 243(h) to require the Attorney General to withhold deportation if an alien can show that his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group,

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Francois, 15 I. & N. Dec. 534, 539 (BIA 1975) ("well-founded" fear); *In re Chukumerije*, 15 I. & N. Dec. 520, 522 (BIA 1975) ("well-founded fear"); *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974) ("well-founded" fear); *In re Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) ("reasonable fear" and "well-founded fear"); *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973) ("well-founded fear").

or political opinion." [19] Like the new definition of "refugee," the modification of Section 243(h) was effected solely for the sake of clarity—in order to conform its language more closely to that of the Protocol. Indeed, the drafters of the modification of Section 243(h) specifically noted that the standards that the Board and the courts had been applying under the prior formulation of Section 243(h) were fully consistent with the modification:

> *Withholding of Deportation*—Related to Article 33 [the section of the Protocol that prohibits the expulsion or return of refugees] is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.
>
> *Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.* This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney

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[19] The Section now reads (8 U.S.C. (Supp. V) 1253 (h)(1)):

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Compare the prior version set forth at note 2, *supra*.

> General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *
>
> As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

H.R. Rep. No. 96-608, *supra*, at 18 (emphasis added).[20] See also S. Rep. No. 96-256, *supra*, at 9 ("[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees").

Cognizant of Congress' intent not to alter the standard for relief under Section 243(h) by enactment of the Refugee Act, the Board, since passage of that legislation, has continued to use interchangeably the phrases "clear probability" and "well-founded fear" to describe that standard. See, *e.g.*, *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6-7 ("clear probability" and "well-founded fear"); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 3-5 ("clear probability" used by immigration judge; "well-founded fear" used by the Board). As the Third Circuit correctly observed in *Rejaie* v. *INS* (App. F, *infra*, 50a), "[u]nder this analysis the Board takes into consideration an alien's apprehensions of persecution, but also requires him to produce objective evidence which demonstrates the realistic likelihood that he, or a class to which he

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[20] The House's modification of Section 243(h) was adopted by the Conference Committee. S. Rep. No. 96-590, 96th Cong., 2d Sess. 20 (1980).

belongs, will be persecuted. Generalized, undocumented fears of persecution or political upheaval which affect a country's general populace are insufficient bases for withholding deportation under § 243(h)." See *In re Martinez-Romero, supra*, slip op. 6-7.

At least in practice, therefore, the terms "well-founded fear" and "clear probability" are equivalent. Accordingly, by holding that the Refugee Act of 1980 requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' that an individual will be singled out for persecution" (App. B, *infra*, 23a), the court of appeals has significantly liberalized the standard by which aliens' claims are to be assessed. In so doing, the court below has worked a fundamental change in the substance of our immigration laws—a result that is in direct contravention of the intent underlying the United States' accession to the United Nations Protocol in 1968 and the enactment of the Refugee Act of 1980.[21] Review by this Court is warranted for this reason as well.

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[21] In connection with its recent consideration of the proposed Immigration Reform and Control Act of 1982, the House reiterated the congressional understanding that the 1968 accession to the Protocol did not expand the substantive rights of aliens (H.R. Rep. No. 97-890, 97th Cong., 2d Sess. 51 (1982) (emphasis added)):

> By accession to the Protocol the United States agreed not to deport a refugee "to frontiers or [*sic*] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion." *Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States.* The Committee is convinced that nothing in present law, nor in

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1982

[the proposed legislation], should be construed as providing less protection than the Protocol. That is, *the Committee views the Protocol as creating no substantive or procedural rights not already existing under current immigration law* or under the law as modified by the Committee Amendment. *The Committee thus agrees with the holding in* Pierre *v.* United States [, supra,] *wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 574-575—August Term, 1981

(Argued January 13, 1982 Decided May 5, 1982)

(Rehearing Decided July 29, 1982)

Docket Nos. 81-2288, 81-4162

PREDRAG STEVIC, PETITIONER-APPELLANT

—*v.*—

CHARLES SAVA, District Director, Immigration and Naturalization Service, New York Office,
RESPONDENT-APPELLEE

PREDRAG STEVIC, PETITIONER

—*v.*—

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Before:

OAKES, NEWMAN and WINTER,
Circuit Judges.

ON PETITION FOR REHEARING

The INS has petitioned for rehearing, claiming, *inter alia*, that Stevic had not raised the dispositive issue before the BIA and that there was not a proper opportunity to brief that issue before us.

We have reviewed the briefs and the transcript of oral argument and find that prior to this petition, the INS raised no issue as to exhaustion or waiver in the proceedings before the BIA. During oral argument, counsel for the INS twice stated that if the Refugee Act of 1980 changed the legal standard, the matter ought to be remanded to the BIA for further consideration.[1] There is not even a hint of a claim that

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[1] JUDGE WINTER:

* * * *

The summary given us by the petitioner makes it pretty clear that the BIA decision did not recognize, did not show any explicit recognition that the standard may have changed subsequent to the January 1980 decision.

If we were to decide that the standard has changed, wouldn't we then be bound to grant some relief, at least by asking the BIA review the facts here under the new standard?

MR. PATRICK: Your Honor, if the Court were so inclined as to feel that the clear probability of persecution standard, which is used by the BIA on the third page of its decision, is the improper standard, it would seem that there certainly would have to be a reconsideration, at least of the motion to reopen, based on any new standard the Court were to feel existed.

* * * *

JUDGE WINTER: Well, the troubling part of the decision is that they . . . state expressly that he hasn't presented any new evidence that wasn't in their prior decision, when, in effect, there may not have been new evidence, but there were new problems.

MR. PATRICK: Referring to the new statute, you mean in that regard?

JUDGE WINTER: Yes.

MR. PATRICK: The decision is, of course, what is being reviewed here. It has been written and it stands. The Service feels quite secure in its interpretation of the

we should affirm because Stevic had failed to raise the Refugee Act issue before the BIA. We indicate no view as to what result would follow in a case in which such a claim was made.

So far as the opportunity to brief the question is concerned, we note that the petition concedes the issue was raised in this Court by Stevic. Moreover, the oral argument dealt almost exclusively with the effect of the Refugee Act of 1980. Had the INS felt that its briefing of the issue was inadequate, it had ample opportunity to make appropriate motions. This it declined to do. We have, nevertheless, reviewed the materials presented in the petition relevant to the merits of the decision. We find that they were fully considered in our deliberations and previous opinion, to which we adhere.

The petition for rehearing is denied.

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law and I am here to represent the Service's position in that regard.

But obviously, with your Honor's hypothetical question, if the Court were to feel that the standard were improper, certainly a reconsideration under the new standard would apparently be the proper step in that regard.

Transcript of Oral Argument before this Court, January 13, 1982, pp. 29-31.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 574-575—August Term, 1981

(Argued January 13, 1982 Decided May 5, 1982)

Docket Nos. 81-2288, 81-4162

PREDRAG STEVIC, PETITIONER-APPELLANT

—*v.*—

CHARLES SAVA, District Director, Immigration and Naturalization Service, New York Office,
RESPONDENT-APPELLEE

PREDRAG STEVIC, PETITIONER

—*v.*—

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Before:

OAKES, NEWMAN, and WINTER,
Circuit Judges.

Appeal from an order entered in the United States District Court for the Southern District of New York (Whitman Knapp, *Judge*) denying a petition for writ

of habeas corpus, and a petition for review of a decision of the Board of Immigration Appeals denying a motion to reopen deportation proceedings.

The denial of the petition for writ of habeas corpus is affirmed. The denial of the motion to reopen deportation proceedings is reversed and remanded.

WINTER, *Circuit Judge*:

This is a consolidation of (1) an appeal from the dismissal of a petition for a writ of habeas corpus, and (2) a petition for review of a final order of deportation of the Board of Immigration Appeals ("BIA"). The major issue is whether the Refugee Act of 1980 changes the legal standard for aliens seeking political asylum in order to avoid deportation. We hold that it does and reverse the BIA's order denying the motion to reopen.

BACKGROUND

The petitioner-appellant, Predrag Stevic, is a citizen of Yugoslavia. He entered the United States on June 8, 1976, with a visa permitting him to remain until July 25, 1976. The purpose of the trip was to visit his sister who had married a United States citizen and was a permanent resident here. When his visa expired, Stevic neither left nor sought an exten-

sion of time. Deportation proceedings were commenced. A hearing was held on December 16, 1976, before Immigration Judge Anthony D. Petrone. Stevic's counsel neither contested his deportability nor requested political asylum. Rather, Stevic consented to "voluntary departure" within sixty days and designated Yugoslavia as the country to which he desired to be deported. Judge Petrone ordered "voluntary departure" for Stevic on or before February 16, 1977. No appeal was taken. When the time came, Stevic again neither departed nor requested an extension of time.

On January 8, 1977, Stevic married Mirjana Doichin, a United States citizen. Thereafter, she filed a "Petition to Classify Status of Alien Relative for Issuance of Immigration Visa" on Form I-130 ("I-130 Petition") with the Immigration and Naturalization Service ("INS"), the first step in obtaining an "adjustment of status" to lawful permanent residence status.[1] On April 5, 1977, the I-130 Petition was approved by the INS. Five days later, Stevic's wife was killed in an automobile accident. As a result, approval of the I-130 Petition was automatically revoked under 8 C.F.R. § 205.1(a)(2).[2]

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[1] 8 U.S.C. § 1225 provides that once an I-130 Petition is granted, the alien may apply to adjust his status to that of "lawfully admitted for permanent residence" in the United States.

[2] 8 C.F.R. § 205.1(a)(2) reads in part:

> The approval of a[n] [I-130] petition is revoked . . . if any of the following circumstances occur . . . before the decision on his application [for adjustment of status to permanent resident] becomes final:
>
> * * * *
>
> (2) Upon the death of the petitioner. . . .

Stevic requested reinstatement of the I-130 Petition on humaritarian grounds pursuant to 8 C.F.R. § 205.1 (a) (3).[3] On August 11, 1977, the INS's Chicago District Director denied that request, stating that Stevic had "no immediate relatives or other equity in the United States." This was in part untrue since Stevic's sister was a permanent resident in this country. Stevic was given notice to surrender for deportation on August 24, 1977. He did not seek review of that decision.

Stevic did not surrender for deportation. Instead, he moved to reopen the deportation proceedings for the purpose of filing an application for withholding of deportation to Yugoslavia under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h).[4] In this motion, Stevic raised for the first time his fear of persecution should he be deported to Yugoslavia. Stevic claimed that, since his

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[3] 8 C.F.R. § 205.1(a) (3) reads in part:

> The approval of a[n] [I-130] petition is revoked . . . if any of the following circumstances occur . . . before the decision on his application [for adjustment of status to permanent resident] becomes final:
>
> * * * *
>
> (3) Upon the death of the petitioner unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.

[4] On that date, 8 U.S.C. § 1253(h) read in part:

> (h) the Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.

marriage, he had become active in an emigre anti-Communist organization, Ravna Gora. He stated that his wife's father, an American citizen, and also a member of Ravna Gora, was imprisoned while visiting Yugoslavia as a tourist in 1974. According to Stevic's habeas petition, his father-in-law was imprisoned for three years, an experience which caused him to commit suicide upon release. Stevic presented evidence of his own activities in other Serbian emigre organizations and of the hostility of the Yugoslav government to these organizations and their members. While the motion to reopen was pending, Stevic applied to the Chicago District Director for asylum. That application was denied on August 1, 1979. On October 17, 1979, Judge Petrone denied Stevic's motion to reopen. Stevic appealed to the BIA. On January 18, 1980, the BIA dismissed Stevic's appeal, stating:

> A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Although the applicant here claims to be eligible for withholding of deportation which was not available at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution.

Stevic did not appeal this decision.

Stevic was then served with a notice to surrender for deportation on February 24, 1981. Once again, he neither complied nor requested an extension of time. On July 17, 1981, he was apprehended in Chicago and transported to J.F.K. International Airport

in New York for deportation. During a transfer to a connecting flight for Yugoslavia, Stevic attempted to escape and was detained by the INS. Deportation was rescheduled. On July 21, 1981, Stevic petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York. The District Court, limiting its consideration to whether the August 11, 1977 decision denying humanitarian relief was an abuse of discretion, denied the petition. Stevic appealed.

Stevic also filed a second motion to reopen his deportation proceedings before the BIA. On September 3, 1981, the BIA denied that motion. It stated:

> The position of this motion is identical to the prior one; . . . No showing has been made that the submitted information was not available to the respondent prior to this date, nor that conditions in Yugoslavia have substantially changed since he filed the first motion . . . .
>
> * * * * *
>
> In addition, we also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Matter of McMullen*, Interim Decision 2831 (BIA 1981) . . . .

Stevic petitions for review of that decision.

The appeal from the District Court and the petition for review of the BIA decision have been consolidated.

APPEAL FROM THE DISTRICT COURT

In his petition for a write [*sic*] of habeas corpus,[5] Stevic challenged the validity of the denial of humanitarian relief by the INS's Chicago District Director on August 11, 1977.

Like the District Court, our review is limited to determining whether that decision is an abuse of discretion or unsupported by substantial evidence. The granting or denying of humanitarian relief is a matter for the exercise of discretion by the Attorney General and his decision may not be overturned by a reviewing court "simply because it may prefer another interpretation . . . ." *INS* v. *Wang*, 450 U.S. 139, 144 (1981).

The District Director's decision is by no means invulnerable, since the statement that Stevic has no immediate relatives in this country is a plain mistake of fact. Stevic's immigration record plainly indicated that his original purpose in entering the United States was to visit his sister, then and now a permanent resident.

Judge Knapp noted the Director's error, but declined to grant relief since no effort was made at the time either to bring the error to the Director's at-

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[5] The District Court had jurisdiction to review the denial of Stevic's request for humanitarian relief by writ of habeas corpus since Stevic's deportability was not at issue therein. *Daneshvar* v. *Chauvin*, 644 F.2d 1248 (8th Cir. 1981); *United States ex. rel. Panco* v. *Morris*, 426 F. Supp. 976, 978 n.4 (E.D. Pa. 1977). Final orders of deportation are directly reviewable by this Court under 8 U.S.C. § 1105a. *See* note 6, *infra*.

tention or to appeal. We also decline to act on the basis of a factual error in a discretionary decision now some four and one-half years old. Stevic has had more than ample opportunity to bring the error to the Director's attention or challenge it before the BIA. Since we cannot say that, but for the Director's prior error, humanitarian relief would have been granted or that such relief is mandatory in light of the true facts, the only legitimate function the writ might serve would be to permit Stevic to file a renewed application to reinstate the I-130 Petition. Stevic, however, has been free to make such an application for years, including the period during which this appeal has been pending, but has not done so. For those reasons, we affirm Judge Knapp.

REVIEW OF THE BIA DECISION

The September 3, 1981 decision of the BIA raises more complex issues.[6] The BIA considered Stevic's motion to reopen the deportation proceedings as raising essentially the same claims as were disposed of by the denial of his first motion to reopen on January 18, 1980. Stevic argues that, subsequent to the first motion to reopen, but prior to the second, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), changed the legal standard relating to applications for political asylum. If he is correct, the BIA decision must be reversed.

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[6] Under 8 U.S.C. § 1105a, the BIA decision of September 3, 1981, denying Stevic's motion to reopen, is reviewable as a final order of deportation within the Act. *Foti* v. *INS*, 375 U.S. 217 (1963); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam); *Wong Wing Mang* v. *INS*, 360 F.2d 715 (2d Cir. 1966).

Although the matter is hardly free from doubt, as the ensuing discussion reveals, we agree with Stevic's statutory argument. Since the Refugee Act of 1980 is the end product of an evolutionary process in the law of asylum, it is necessary to trace its origins in detail.

1. Pre-1968 Asylum Law

Before 1968, political asylum was governed by two statutory provisions of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952). The first, which governed deportable aliens already in this country, was Section 243(h), 8 U.S.C. § 1253(h), which read:

> The Attorney General is authorized to withhold deportation of any alien . . . to any country in which *in his opinion* the alien *would be subject to persecution* on account of race, religion, or political opinion . . . .

(Emphasis supplied).

Under that provision, an alien already in the United States and seeking political asylum to avoid deportation had to make a showing of a "clear probability of persecution" directed at the particular alien. *Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena* v. *INS*, 379 F.2d 536 (7th Cir. 1967). Objective proof that the applicant would be singled out for persecution by the authorities in the country to which he or she was deported was required.

The second relevant provision, which governed the admission of aliens seeking political asylum who were not in this country, was Section 203(a)(7), 8 U.S.C. § 1153(a)(7), which read:

> (a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> > (7) Conditional entries shall next be made available by the Attorney General, . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or *fear of persecution* on account of race, relation [*sic*], or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, . . .

(Emphasis supplied).

Section 203(a)(7) was thus directed at aiding refugees fleeing particlular regions and particular kinds of regimes. The legal standard under that section was considerably less stringent than Section 243(h)'s "clear probability" of persecution of a singled-out individual, a fact explicitly recognized by the BIA in its decisions. *Matter of Tan*, 12 I. & N. Dec. 564 (1967). "[F]ear of persecution," under relevant BIA decisions, required only a showing of "good reason" for such fear. *Matter of Ugricic*, 14 I. & N. Dec. 384, 385-386 (1972). *See also Matter of Adamska*, 12 I. & N. Dec. 20[1] (1967).

2. The United National Protocol

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees,

19 U.S.T. 6257, 606 U.N.T.S. 268 ("Protocol"). The Protocol adopted, with certain changes not relevant here, the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 ("Convention").[7] Under the Protocol, a "refugee" is a person who,

> owing to a *well-founded fear of being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality . . . .

(Emphasis supplied). No party to the Protocol may, under Article 33 of the Convention,

> return . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. . . .

The language of the Protocol seems considerably more generous than the "clear probability" test applied under Section 243(h). A "well-founded fear of persecution," for example, is closer to Section 203(a)(7)'s "fear of persecution" than to Section 243 (h)'s admittedly restrictive standard. Moreover, the history of the Convention's definition of "refugee" demonstrates that the drafters believed a showing of "good reason" to fear persecution was sufficient to prove one's status as a "refugee." United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (1950) (E/1618; E/AC 32/5). That test is identical to the one used by the BIA to describe the applicable

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[7] The United States never acceded to the Convention.

standard under former Section 203(a)(7). *Matter of Ugricic, supra.*

Interpretation of the Protocol is also informed by the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979).[8] The *Handbook* is a response to requests for guidance as to the Protocol's requirements and is based on the High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject. It, too, supports the view that the Protocol embodies a more generous standard than the "clear probability" test.

Briefly summarized, it states that a "well-founded fear" has subjective as well as objective elements. *Id.* at ¶ 38. The applicant's state of mind is thus relevant, as are conditions in the country of origin, its laws, and experiences of others. *Id.* at ¶ 42-43. The applicant must show "good reason why he individually fears persecution," but a desire "to avoid a situation entailing the risk of persecution" may be enough. *Id.* at ¶ 45. Persecution means a threat to life or freedom. *Id.* at ¶ 51.

Our examination of the Protocol, its language, history and subsequent usage as derived from the *Handbook* leads us to conclude that it is somewhat more generous than the BIA's administrative practice in applying Section 243(h), which has required an applicant for asylum to show a "clear probability" that he or she will be singled out for persecution. The

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[8] The BIA has treated the *Handbook* as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriquez-Palma* [*sic*], Interim Decision No. 2815 (BIA, August 26, 1980).

"clear probability" test had been initially articulated by the BIA as its preferred way of implementing what had been the wholly discretionary authority of Section 243(h). *Matter of Joseph*, 13 I. & N. Dec. 70 (1968); *see Cheng Kai Fu* v. *INS*, *supra*, 386 F.2d at 753; *Lena* v. *INS*, *supra*, 379 F.2d at 528. Since Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment.

3. Asylum Law from 1968 to 1980

In the legislative proceedings leading to the United States accession to the Protocol in 1968, assurances were given by the President and the State Department that existing legislation did not need to be amended in order to comply with the Protocol. S. Exec. K, 90th Cong., 2d Sess. III, VII, VIII; S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 7, 10; *see also Ming* v. *Marks*, 367 F.Supp. 673, 677-79 (S.D. N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974). Nevertheless, the lack of identity between the prior practice under Section 243(h) and what should be expected after accession to the Protocol was at least suggested. The Secretary of State informed the Senate that Article 33 is "comparable" to Section 243(h) and that "it can be implemented within the administrative discretion provided by existing regulations." S. Exec. K, *supra*, at VIII. The lack of identity was also noted by the BIA, which characterized the legislative history of the accession as indicating that laws relating to deportation of refugees would remain "substantially" unaffected and that any "minor" changes could be handled "administratively." *Matter of Dunar*, 14 I.&N. Dec. 310, 316 (1973).

Despite this recognition that some administrative changes might be required by the Protocol, the BIA's decision in *Dunar* concluded that the Protocol did not modify the "clear probability" test that it had been using in Section 243(h) proceedings. The BIA's reasoning in *Dunbar* [*sic*] began with the canon of construction disfavoring repeals by implication unless the later treaty is absolutely incompatible with the earlier statute. *Id.* at 314. It also noted the representations made by the Executive Branch to the Senate that existing immigration laws embodied the principles of the Protocol so far as refugees were concerned. *Id.* Turning to language and history, the BIA quoted from the Ad Hoc Committee's report equating a "well-founded fear" with "good reason [to] fear." *Id.* at 319. The quotation was used, however, only to refute the strawman argument that the "well-founded fear" test was exclusively subjective and to show that objective evidence was also relevant. *Id.* at 319. Ignoring that its own case law had consistently differentiated between Section 203(a)(7)'s "good reason" test and Section 243(h)'s "clear probability" requirement, the BIA leapt illogically from the proposition that "good reason" includes objective factors as well as an applicant's subjective beliefs to the conclusion that it was the same test as "clear probability." *Id.* at 319-21. The rest of the *Dunar* opinion reconciles the existence of discretion in the Attorney General under Section 243(h) with the mandatory nature of the Protocol by concluding that the Attorney General had always exercised his discretion to withhold deportation when the requisite legal standard was met. *Id.* at 321-23.

The only Court of Appeals to confront directly the issue of whether the Protocol requires a change in

administrative practice under Section 243(h) was presented with the extravagant claim that the Protocol has shifted the inquiry entirely to an assessment of the applicant's subjective state of mind. *Kashani* v. *INS*, 547 F.2d 376, 379 (7th Cir. 1977). *Kashani* rejected this contention, reasoning that the Protocol's test of a "well-founded fear" must be "more than a matter of [the applicant's] own conjecture." *Id.* The Seventh Circuit also predicted that the "well-founded fear" standard of the Protocol and the "clear probability" standard of the BIA administering Section 243(h) "will in practice converge," *id.* Finally, the Court reconciled the discretionary power of the Attorney General with the mandatory aspect of the Protocol by relying on *Dunar*'s assertion that the Attorney General always withheld deportation whenever the "clear probability" test was met. *Id.* The Fifth Circuit continued to refer to the "clear probability" test in *Pierre* v. *United States*, 547 F.2d 1281, 1289 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977), but did so in the context of a parole application pursuant to 8 U.S.C. § 1182 (d)(5), and with emphasis upon the discretionary nature of the Attorney General's decision, *id.* However, in *Coriolan* v. *INS*, 559 F.2d 993 (5th Cir. 1977), the Fifth Circuit, remanding a Section 243(h) application for reconsideration, noted that, while the Protocol did not "profoundly" alter American refugee law, United States adherence to the Protocol "reflects or even *augments* the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law." *Id.* at 977 (emphasis added).

4. The Refugee Act of 1980

Against this backdrop, Congress enacted a comprehensive revision of asylum law in the Refugee Act of

1980. The immediate occasion for the legislation appears to have been the large numbers of "boat people" from Southeast Asia and refugees from Cuba, as well as the generalized appreciation that United States refugee policy had to be geared to handle sudden, unpredictable influxes of refugees. Congress seized this opportunity to make a comprehensive revision of immigration laws relating to asylum.

Among the revisions were amendments which did what had not been done when the United States acceded to the Protocol in 1968: the language of the immigration law was explicitly conformed to that of the Protocol, notwithstanding the earlier assurances that statutory changes were not necessary to comply with the Protocol.

Thus, whereas earlier laws contained no definition of "refugee," Section 201(a) of the 1980 Act, 8 U.S.C. § 1101(a)(42) states:

> The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or *a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion, . . .

(Emphasis supplied). This language conforms to the definition of refugee adopted by the Protocol. *Ante* at 8.

Section 243(h) also underwent major amending in order to conform it to Article 33 of the 1951 Convention as adopted by the Protocol. It now reads:

> The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien's life or freedom would

be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Another major change was to repeal the prior authority of Section 203(a)(7) for conditional entry of a limited number of refugees and replace it with the broader authority of newly enacted Section 207, 8 U.S.C. § 1157. Finally, Section 208(a) authorized a uniform procedure for those seeking asylum, whether physically present in the United States or at a border or point of entry. 8 U.S.C. § 1158(a). Regulations promulgated by the INS direct that asylum requests made after the institution of deportation proceedings shall "also be considered as requests for withholding . . . deportation pursuant to Section 243(h) of the Act." 8 C.F.R. § 208.3.

The significance of these changes, pertinent to this appeal, is that the adoption of a uniform definition of refugee eliminates the prior distinction between the standard for determining eligibility for a discretionary grant of asylum (formerly authorized by Section 203(a)(7) and currently authorized by Section 207) and the standard for determining eligibility for the mandatory withholding of deportation pursuant to amended Section 243(h).

The legislative history of the Refugee Act of 1980, fairly read, recognizes that the definition of refugee is new and brings United States law into compliance with the Protocol. S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 9 (1979). The Senate Report seems to assume, however, that the amendments to Section 243(h) work no major change. S. Rep. No. 96-256 at 9, 17. The House Report is more ambiguous, acknowledging that the BIA and the courts have said that the

protection of Article 33 has always been available under Section 243(h) but insisting that the Article's language be explicitly used "for the sake of clarity." H.R. Rep. No. 96-608 at 18. The Conference Report states that the new Section 243(h)

> is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol. The Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation.

H.R. Conf. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980).

5. Conclusion

Stevic's final motion to reopen under Section 243(h) was based on the Refugee Act of 1980. The BIA's denial of the motion rested on its implied view that the 1980 Act wrought no changes relevant to Stevic's application. We conclude that the Refugee Act of 1980 completed the process, begun with accession to the Protocol, of modifying the legal test applicable to Section 243(h) applications for relief from deportation. We reverse and remand for a hearing under the new standard.

We make no pretense of following a bright line drawn in the legislative history. Congress was rightly concerned with general issues of policy, and the INS chose not to invite it to address the interpretive problems which would inevitably arise under the new statutory language. Nevertheless, we find meaningful guideposts and read them as indicating that, at least with the passage of the 1980 Act, the "clear probability" test is no longer the applicable guide for administrative practice under Section 243(h).

The 1980 Act thoroughly undercuts the reasoning of *Dunar, supra.* Since the relevant statutory language was extensively overhauled and made to conform to the Protocol, canons of construction relating to repeals by implication are no longer of any relevance. Moreover, the Act eliminated the distinction between aliens seeking to enter as refugees under the old Section 203(a)(7) and deportable aliens already in the country seeking political asylum under the old Section 243(h). Under prior law, the former were subject to the "good reason to fear" test while the latter had to show a "clear probability" that they would be singled out for persecution. *See ante* at 7-8. Since the 1980 Act dictates that a uniform test of "refugee" be applied to all aliens, whether seeking admission under the newly enacted Section 207, or seeking to avoid deportation under amended Section 243(h), the legislative history indicating no major changes cannot alter the inevitable consequence that some change in administrative practice must occur. As to either applicants for asylum or applicants for withholding deportation, a change from the previous dual standard is contemplated. *See* Note, *The Right of Asylum under United States Law*, 80 Colum. L. Rev. 1125, 1138 n.87 (1980).

We believe Congress' sympathy to the plight of refugees such as the "boat people" is relevant. The general purpose of the Act is to regularize, not hinder, their entry. The Act

> reflects one of the oldest themes in America's history—welcoming homeless refugees to our shores. It gives statuory meaning to our national commitment to human rights and humanitarian concerns. . . .

S. Rep. No. 96-256 at 1. In the context of that humane attitude, it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law. Where the choice is beween a concededly rigorous standard which would subject some potential asylees to the risk of persecution and a more generous one which tilts toward protection from such risk, the strongly humanitarian rhetoric accompanying the legislation is helpful to interpretation.

More important, Congress left no ambiguity about its intention to conform United States domestic law to the Protocol. That was stated explicitly on every relevant occasion in the legislative history. *See, e.g., ante* at 14. The Conference Report unequivocally directed that Section 243(h) "be construed consistent with the Protocol." H.R. Cong. Rep. No. 96-781 at 20. The definition of "refugee" and the new language of Section 243(h) are based literally upon the Protocol, and the creation of a uniform legal test for refugees is derived directly from it. Finally, the discretionary language "in his opinion" has been eliminated from Section 243(h), thereby rendering the uniform standard mandatory for Section 243(h) relief. *Cf. McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981).

We believe, therefore, that the Refugee Act of 1980 calls upon courts, in construing the Act, to make an independent judgment as to the meaning of the Protocol. Both the text and the history of that document strongly suggest that asylum may be granted, and, under Section 243(h), deportation must be withheld, upon a showing far short of a "clear probability" that an individual will be singled out for persecution. *See ante* at 12-14. The guidance available in the High Commissioner's *Handbook*, which was published before the enactment of the Refugee Act of

1980, is to a similar effect. Since the *Handbook* was specifically designed to aid governments in interpreting the Protocol, at 2, and has been subsequently relied upon by the BIA in interpreting the revised Section 243(h), *see Matter of Rodriguez-Palma*, *ante* at note 8, we accord its view considerable weight.

Even when the Section 243(h) authority was discretionary, we held that the "standards employed by the Attorney General in exercising his discretion under Section 243(h) are subject to judicial review." *Sovich* v. *Esperdy*, 319 F.2d 21, 26 (2d Cir. 1963). After the Protocol imposed a prohibition against return of a refugee to a country where persecution would be threatened and especially after Congress amended Section 243(h) to eliminate discretion and conform the provision to the terms of the Protocol, a reviewing court has a clear responsibility to assure that the non-discretionary exercise of Section 243(h) authority has been performed according to the correct standards of law. While we do not sit to second-guess the merits of the decisions reached under Section 243(h), our obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing BIA decisions under grants of discretionary authority, such as the "extreme hardship" provision of Section 244, 8 U.S.C. § 1254(a)(1), *INS* v. *Wang*, *supra*.

It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by the traditional indices of legislative intent, by the *Handbook* and by experience.

The BIA's denial of Stevic's second motion was based on a legal test which, we hold, is no longer the law. Stevic has alleged a fear of persecution based upon his anti-Communist activities in this country, the general hostility of the Yugoslav government to such activities and the particular fate of his father-in-law. His claim is not so frivolous that it should not be tested in a plenary hearing under the legal standards established by the Protocol.[9]

We reverse and remand for such a hearing.

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[9] To the extent that other changes in statutory language, such as the addition of the words "membership in a particular social group" to Section 243(h), might be helpful to Stevic, he is entitled to be heard on those also. In *Dunar*, the BIA itself recognized that the purpose of Section 243(h), even before its amendment in 1980, was to shield aliens from persecution because they are members of "*dissident* or unpopular minority groups." 14 I.&N. Dec. at 320 (emphasis added). And the BIA noted that the Protocol's "inclusion of the two new classes [nationality and social group] within the ambit of section 243(h) . . . is clearly compatible with the beneficent purposes underlying that provision." *Id.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Judgment-Filed May 5, 1982]

[Caption omitted]

Petition for review of an order of the Board of Immigration Appeals,

This cause came to be heard on the record of the Immigration and Naturalization Service and was argued by counsel,

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the order of the Board of Immigration Appeals be and it hereby is reversed and the action remanded to said Board for further proceedings in accordance with the opinion of this court.

IT IS FURTHER ORDERED that the appeal from an order of the United States District Court for the Southern District of New York be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX D

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Sep. 3, 1981

File: A21 535 549—New York

In re: PREDRAG *STEVIC*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Ann L. Ritter, Esquire
420 Madison Avenue, Suite 1200
New York, New York 10017

ON BEHALF OF SERVICE:

Gerald S. Hurwitz
Appellate Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant—remained longer than permitted

APPLICATION: Reopening

In a decision dated December 16, 1976, the immigration judge found the respondent deportable under

section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), based on his own admissions. At that time the respondent designated Yugoslavia as the country of deportation and was granted 60 days voluntary departure. No appeal was taken from that order.

On January 8, 1977, the respondent married a United States citizen who subsequently filed an immediate relative visa petition on his behalf. The petition was approved on April 5, 1977. On April 10, 1977, the respondent's wife was killed in an automobile accident and on June 13, 1977, the Service revoked the approved visa petition. On August 24, 1977, the respondent filed a motion to reopen the deportation hearing to submit an application for withholding of deportation. His motion alleged that it was not until after his marriage to Mira Doychin that he became actively involved with an anti-communist organization, "Ravna Gora" and he now feared that he would be imprisoned were he deported to Yugoslavia. The respondent further claimed that his father-in-law returned to Yugoslavia as a tourist in 1974 and has been imprisoned there since, due to his involvement with Ravna Gora. The immigration judge denied the motion on October 17, 1979, upon finding that the respondent had failed to establish that there was a clear probability that he would be singled out for persecution. The immigration judge concluded that the affidavit submitted with the motion contained only general, self-serving statements, undocumented by specific evidence.

This Board, in affirming the immigration judge's decision on January 18, 1980, concluded that the submitted evidence did not demonstrate that the respondent himself would be subject to persecution in Yugoslavia. The only material received by the Board at

that time was a copy of the oath which the respondent took upon joining Ravna Gora and a clipping from the Chicago Tribune of February 14, 1973, referring to another Yugoslav who was sentenced to prison in Yugoslavia.

No further legal action was taken by the respondent until after he was apprehended by the Service in Chicago and deportation was attempted. The respondent was detained in New York after engaging in an altercation with his guards while changing planes. It was at this point that the motion to reopen currently before us was submitted.

The main thrust of the respondent's present and prior motion to reopen is that he will be persecuted for his anti-communist activities in the United States if deported to Yugoslavia. In support of his claim, the respondent has currently submitted numerous articles and reports discussing present day political conditions in Yugoslavia; and several petitions and affidavits from members of Serbian anti-communist organizations in New York City and Chicago stating that the respondent would be arrested upon his return to Yugoslavia. The allegation is also made in counsel's brief that if the respondent were to return to his home town of Gnjilane in the province of Kosovo, his life would be in danger due to the Albanian majority residing in that province who are allegedly killing all Serbians in order to gain control of the province and secede from Yugoslavia.

A motion to reopen deportation proceedings will not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *See* 8 C.F.R. 3.2. A party seeking reopening must state the new facts which he intends to establish, supported by affidavits

or other evidentiary material. *See* 8 C.F.R. 3.8; 8 C.F.R. 103.5. The grant or denial of a motion to reopen is itself a discretionary determination with the outcome dependent in part upon the likelihood that the movant will be granted the relief sought if reopening is permitted. *See Matter of Rodriguez*, Interim Decision 2727 (BIA 1979).

In the instant case, the respondent voluntarily named Yugoslavia as the country of deportation, presumably knowing that his future wife's father had been imprisoned there in 1974. When the respondent submitted his first motion to reopen in 1977 the thrust of his argument was that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization. The immigration judge denied the motion for lack of specific evidence relating to the respondent and how he would be persecuted. On appeal, the respondent furnished no new documentation. In fact, in the four years since the first motion was filed the respondent failed to submit any corroborating evidence of how he might be singled out for persecution were he to return to Yugoslavia, until after he had been picked up by the Service to be deported.

The position of this motion is identical to the prior one; that the respondent will be persecuted because of his anti-communist activities in the United States. No showing has been made that the submitted information was not available to the respondent prior to this date, nor that conditions in Yugoslavia have substantially changed since he filed the first motion.

Accordingly, we find that the respondent has failed to comply with the provisions of 8 C.F.R. 3.2 in that there has been no showing that the submitted material was not available nor could not have been discovered or presented at a former hearing.

In addition, we also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A motion to reopen based on a section 243 (h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2 Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Matter of McMullen*, Interim Decision 2831 (BIA 1981).

In the instant case, the many journalistic articles submitted by the respondent are of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to the respondent. The affidavits and petitions contained in the file, while they conclude that the respondent will be imprisoned if he returns to Yugoslavia, do not contain any supporting facts. They express an opinion but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia.

With regard to the respondent's allegation that he will be persecuted by Albanian ethnics in Gnjilane, we find that there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to country [*sic*], not a city or province. *Lavdas* v. *Holland*, 235 F.2d 955 (3 Cir. 1956); *Cantisani* v. *Holton*, 248 F.2d 737 (7 Cir. 1957).

For the above mentioned reasons, we will deny the respondent's motion.

ORDER: The motion to reopen is denied.

Chairman

APPENDIX E

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Jan. 18, 1980

File: A21 535 549—Chicago

In re: PREDRAG *STEVIC*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Nathan T. Notkin, Esquire
11 South La Salle Street
Chicago, Illinois 60603

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)—Nonimmigrant—remained longer than permitted

APPLICATION: Motion to reopen

The respondent appeals from the October 17, 1979 decision of an immigration judge denying his motion to reopen the deportation proceedings for the purpose of applying for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). The appeal will be dismissed.

The adult male respondent is a native and citizen of Yugoslavia who last entered the United States on or about June 8, 1976 as a nonimmigrant visitor authorized to remain until July 25, 1976. On December 16, 1976 an immigration judge found the respondent deportable as an overstay under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), but granted him the privilege of voluntary departure on or before February 16, 1977. No appeal was taken from that order.

On August 24, 1977, counsel for the respondent filed a motion to reopen the deportation proceedings so that the respondent might file an application for withholding of deportation. The motion states that at the time of the deportation hearing, the respondent had no reason to believe that he might be subject to persecution in Yugoslavia. Since that time, however, the respondent maintains that he has been closely associated with the members of Ravna Gora, an anti-communist organization in Chicago. Through affidavit, the respondent asserts that he became involved with the activities of this group after his marriage to Mira Doychin on January 8, 1977. He further claims that his father-in-law returned to Yugoslavia as a tourist in 1974 and has been imprisoned there since, due to his involvement with Ravna Gora. Although his wife is now deceased, the respondent fears that he will also be imprisoned because of his anti-communist activities in the United States.

The immigration judge denied the motion upon finding that the respondent had failed to establish that there was a clear probability that he would be singled out for persecution. He concluded that the respondent's affidavit contained general, self-serving statements, undocumented by specific evidence.

On appeal, counsel for the respondent argues that the regulations provide that either affidavits *or* other

evidentiary material be presented in support of a motion to reopen. He submits that at this stage of the proceedings, he should only be required to present the ultimate facts sought to be proven and that the evidence supporting those facts need only be introduced at the reopened hearing.

Motions to reopen in deportation proceedings will not be granted unless it appears that there is new evidence which is material and could not have been discovered and presented at the former hearing. 8 C.F.R. 242.22. A party seeking a reopening must state the new facts which he intends to establish, supported by affidavits or other evidentiary material. 8 C.F.R. 3.8; 8 C.F.R. 103.5.

We recognize counsel's argument that the purpose of a reopened hearing is to enable a movant to develop the new facts and circumstances in his case at the hearing itself. At the same time, however, the immigration judge and the Board are entitled, at a minimum, to factual allegations supported by evidence substantial enough to warrant the delay and time involved in the grant of a reopened hearing. The grant or denial of a motion to reopen is a discretionary determination with the outcome dependent in part upon the likelihood that the applicant will be granted the relief sought if reopening is permitted. *See Matter of Rodriguez*, Interim Decision 2727 (BIA 1979). This is not to say that an applicant must make a full presentation of the evidence with the motion. Rather, what is required are facts and evidence of sufficient force to establish prima facie eligibility for the relief sought. *See Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972).

A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that

there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2 Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Although the applicant here claims to be eligible for withholding of deportation which was not available to him at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution. We note that the respondent's appeal brief makes reference to an oath and declaration taken by the respondent in 1977 when he joined the Ravna Gora and that these documents are not included in the record. We do not feel however, that the inclusion of these documents to the file would alter our conclusion that the respondent here has failed to establish a prima facie case for reopening. Although these documents may demonstrate that the respondent is a member of Ravna Gora, no evidence has been submitted to show that he has participated in the activities of the group or that such participation would subject him to political persecution. The applicant's affidavit, unsupported by objective evidence, does not make out a prima facie case for withholding of deportation. *See, e.g., Matter of Sipus, supra*; *Kashani* v. *INS*, 547 F.2d 376 (7 Cir. 1977); *Cheng Kai Fu* v. *INS*, *supra*.

We note further that the respondent's appeal brief makes reference to a newspaper article relating to the imprisonment in Yugoslavia of a United States citizen associated with an anti-communist organization. Although this article is absent from the record file, we will not speculate into its contents, as we do not feel that such evidence demonstrates that the respondent himself will be subject to persecution in Yugoslavia. *See generally, Kashani* v. *INS, supra.* By the

same token, we cannot infer from the imprisonment of the respondent's father-in-law in Yugoslavia that the respondent will be persecuted against based on his own political beliefs.

Based on the foregoing, we conclude that the respondent has failed to establish prima facie eligibility for suspension of deportation. The present motion does not state what evidence the respondent is prepared to present if the proceedings are reopened and does not satisfy us that the additional delay entailed in a reopening would likely be worthwhile. The appeal, accordingly, will be dismissed.

ORDER: The appeal is dismissed.

/s/ David L. Milhollen
Chairman

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2375 and 82-3195

RAMIN REJAIE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

PETITION FOR REVIEW
IMMIGRATION AND NATURALIZATION SERVICE

Submitted Under Third Circuit Rule 12(6)
October 1, 1982

Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*,
and SAROKIN, *District Judge.**

(Filed October 13, 1982)

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* Honorable H. Lee Sarokin, of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

This petition for review of the Board of Immigration Appeals' denial of motions to reopen deportation proceedings requires us to decide whether the Board imposed an improper burden of proof on the petitioner. The petitioner is an Iranian who came to this county in 1978 to attend school for 10 months—from September 1978 to June 1979—and now does not want to return to his native country. He contends that he will be persecuted if he returns to the Islamic Republic of Iran. In considering petitioner's request for political asylum under § 243(h) of the Immigration and Nationality Act, the Board required him to prove "a clear probability of persecution," a formulation that the Immigration and Naturalization Service equates with "a well-founded fear of persecution."

We find no error and deny the petition for review at No. 81-3195.[1]

I.

Ramin Rejaie, a native and citizen of Iran, was admitted to the United States as a nonimmigrant student on September 9, 1978. He was authorized to attend Oakwood School in Poughkeepsie, New York, and to remain in the United States until June 30, 1979. According to Immigration and Naturalization Service allegations, however, he never attended Oakwood School but, without obtaining permission from the INS as required by 8 C.F.R. § 214.2(f)(4), enrolled instead at the Valley Forge Military Academy in Wayne, Pennsylvania. Moreover, he failed to depart the United States on June 30, 1979, or to obtain INS permission to stay beyond that date.

At a deportation hearing held January 8, 1980, Rejaie admitted the allegations. The immigration

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[1] We have before us two petitions for review; however, petitioner agrees that under our decision in *Dastmalchi* v. *INS*, 660 F.2d 880 (3d Cir. 1981), this court is without jurisdiction to review the contention raised at No. 81-2375 that the Immigration and Naturalization Service abused its discretion when, subsequent to petitioner's deportation hearing, it denied his requests for school transfer and for extension of stay. In *Dastmalchi* we held that

> courts of appeals have initial jurisdiction under section 106(a) only in cases seeking judicial review of: (1) a final order of deportation entered pursuant to section 242(b) deportation proceedings; (2) an order made during a section 242(b) deportation proceeding and reviewable by the Board of Immigration Appeals . . .; or (3) a motion to reopen deportation proceedings previously conducted under section 242(b) or to reconsider a final order of deportation . . . .

660 F.2d at 885-86. Therefore, we dismiss the petition for review at No. 81-2375.

judge found him deportable, but granted his request for voluntary departure until Febraury 8, 1980. Rejaie appealed to the Board of Immigration Appeals, but on June 18, 1981, the Board upheld the finding of deportability.

Although ordered to report for deportation on August 27, 1981, on that date he filed a petition for review in this court, No. 81-2375, which entitled him to an automatic stay under 8 U.S.C. § 1105a(3). Also on that date, he filed with the INS a Request for Asylum in the United States, contending that he feared political persecution if he were forced to return to Iran, thereby moving to reopen his case.[2] On

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[2] The relevant INS regulation states: "The applicant for asylum has the burden of satisfying the immigration judge that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as claimed." 8 C.F.R. § 108.3(a) (1981). Moreover, the INS regulation provides:

> A request for asylum introduced by an alien or his representative following completion of a deportation hearing shall be considered as a motion to reopen the hearing for the purpose of submitting a request for withholding of deportation under section 243(h) of the Act . . . . Notwithstanding the provisions of §§ 103.5 and 242.22 of this chapter, a request for asylum may be considered as a motion to reopen under this paragraph and accepted for filing provided it reasonably explains the failure to asser the asylum claim prior to completion of the deportation hearing. If the motion does not reasonably explain such failure the claim for asylum will be considered spurious and dilatory, absent evidence to the contrary.

8 C.F.R. 108.3(b) (1981).

The burden of proof relevant to requests for political asylum is set forth in 8 C.F.R. § 208.5 (1981):

> The burden is on the asylum applicant to establish that he/she is unable or unwilling to return to, and is unable

October 16, 1981, the Board denied his motion to reopen, "on the ground that the respondent has failed to reasonably explain why he did not assert his asylum claim prior to completion of the deportation hearing." Record at 112. On December 10, 1981, he filed a second motion to reopen and reconsider, this time explaining that he had been unaware of certain political developments in Iran at the time of his deportation proceedings. Noting that Rejaie had failed to substantiate the claims made in his motions to reopen, the Board denied the second motion.[3] Rejaie filed a

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or unwilling to avail himself or herself of the protection of the country of such person's nationality . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

[3] The Board explained:

The facts in this case have been fully set forth in our earlier decisions. Over 26 months have now passed since the respondent was granted the privilege of voluntary departure. A warrant for his deportation was issued by the District Director on August 26, 1981. Seven days later, on the very date that the respondent had been ordered to report "completely ready for deportation", he filed a petition for review. Not only does the long history of this case clearly demonstrate a series of dilatory tactics by and on behalf of the respondent, but there has been absolutely no substantiation of what counsel described as the respondent's "well-rounded [sic] fear of persecution, which has grown and developed since the completion of the deportation hearing", or of the alleged prospect of his induction into the military if deported to Iran.

In a memorandum in opposition to this motion to reopen, the Service emphasized that the "respondent has submitted no substantial evidence which would justify reopening." The Service concluded that "The motion to reopen is an obvious attempt to delay the deportation of

second petition for review, No. 82-3195, which we consolidated with No. 81-2375.

II.

Rejaie contends that the Board applied an incorrect burden of proof in considering his fear of persecution in Iran. Before we reach that issue, however, we note a significant omission in Rejaie's argument. Petitioner's brief fails to respond to one of the Board's stated reasons for denying relief: his failure to submit substantial evidence to justify reopening his claim. Under 8 C.F.R § 208.11 (1981)

> [a]n alien may request that . . . [a] deportation proceeding be reopened pursuant to . . . 8 C.F.R. § 242.22 . . . on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the . . . deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary.

Moreover, under § 3.8(a), "[m]otions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." The Supreme Court has observed that motions under § 3.8 "will not be granted 'when

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the respondent, which should not be permitted . . . . To again reopen at this time would be frivolous and would serve no useful purpose." We agree. As this Board has long since held, "There must be some finality to litigation." *See Matter of Campos*, 13 I&N Dec. 148 (BIA 1969). Accordingly, the motion to reopen will be denied.

Record at 85.

a *prima facie* case of eligibility for the relief sought has not been established.'" *INS* v. *Jong Ha Wang*, 450 U.S. 139, 141 (1981) (per curiam) ((quoting *In re Lam*, 14 I. & N. Dec. 98 (BIA 1972)).

Petitioner does not now argue that he made a sufficient showing of "new facts" supported by affidavits or other evidence. Rather, in his brief he simply summarizes the factual content of his motion without explaining which, if any, of the narrated events, substantiated or otherwise, occurred after the deportation hearing and thus qualify as "new facts." His argument to the Board in his second motion to reopen is clearer, however, and indicates that petitioner's "new facts" related to the war between Iran and Iraq, and his unwillingness to serve in the Iranian military. Assuming that the motion before the Board constitutes the basis of petitioner's argument on appeal, we will consider the burden of proof issue.[4]

III.

Until the passage of [the] Refugee Act of 1980, it was generally accepted that under § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), the INS could withhold political asylum absent a "clear probability" that an alien would suffer persecution if deported. *See, e.g., Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena* v. *INS*, 379 F.2d 536, 538

[4] Although the Board in its several opinions did not expressly label the applicable burden of proof, we will assume that it agreed with the government's Memorandum in Opposition to Motion to Reopen, in which the legal standard was identified as "clear probability," Record at 91-92, inasmuch as that standard had been approved in a long line of cases, *see* discussion, *infra*.

(7th Cir. 1967). In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6257, 606 U.N.T.S. 268, which essentially adopted the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150. Under Article 1 of the Protocol, a "refugee" is a person who, "owing to *a well-founded fear of being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality . . . ." (emphasis added). Under Article 33, no party to the Protocol may "return . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion . . . ." Whether accession to the Protocol affected burden of proof of persecution was addressed in *Kashani* v. *INS*, 547 F.2d 376 (7th Cir. 1977), in which the court determined that there was no substantial difference between "clear probability" and "a well-founded fear":

> While the Protocol, unlike section 243(h) of the Immigration and Nationality Act, does not specifically grant discretion to the Government in determining whether deportation must be withheld, it only requires withholding when an alien has a "well founded fear of being persecuted." This language surely refers to more than the alien's subjective state of mind. We hold that an alien claiming a "well founded fear of persecution" must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture. Our interpretation of "well founded" conforms with the understanding of the committee that drafted the

> definition of a refugee. *See* United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (February 17, 1950) (E/1618; E/AC 32/5).
>
> This requirement can only be satisfied by objective evidence that the alien's assertions are correct. Thus, the "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243(h) will in practice converge.

547 F.2d at 379.

This formulation is congruent with the Board's seminal decision in *In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973), in which the Board considered whether the Senate's accession to the Protocol changed an alien's burden under § 243(h) from that of showing a "clear probability of persecution" to that of showing "a well-founded fear of being persecuted." Like the court in *Kashani*, the Board concluded that notwithstanding the difference in the terminology, the showings required by the Protocol and by § 243(h) were essentially the same. The Board characterized the showing of "well-founded fear" as demanding not merely evidence of a subjective or conjectural fear of persecution, but objective evidence establishing a realistic likelihood of persecution. 14 I. & N. Dec. at 319.

The Board's conclusion in *Dunar* is based on the history of the Senate's accession to the Protocol. The Senate clearly acceded to the Protocol with the understanding that the substance and procedures of our immigration law would remain unchanged.[5] More-

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[5] In *Dunar* the Board observed:

> In his statement to the Senate Committee on Foreign Relations, the State Department's representative, Laur-

over, as noted in *Dunar*, a United Nations committee had explained "well-founded fear" as follows: "The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either

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ence A. Dawson [Acting Deputy Director of the Office of Refugee and Migration Affairs] asserted:

> . . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a contracting state to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent, with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act.

14 I. & N. Dec. at 317 (quoting Protocol Relating to Refugees, Exec. Rep. No. 14, 90th Cong., 2d Sess. app. at 8 (1968) [hereinafter cited as Report]).

The following colloquy between Senator Sparkman, Chairman of the Committee, and Mr. Dawson is also helpful:

> SENATOR SPARKMAN. I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?
>
> MR. DAWSON. That is absolutely clear.

Report at 19.

Senator Mansfield, at the time of the Protocol's submission to the Senate stated: "It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country." 114 Cong. Rec. 12,021 (daily ed. Oct. 3, 1968).

been actually a victim of persecution or can show good reason why he fears persecution." United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39 (1950). In the years following the decision in *Dunar*, the expressions "clear probability" and "well-founded fear" were regarded as meaning the same thing: an alien who requested political asylum in America had to present some objective evidence establishing a realistic likelihood that he would be persecuted in his native land. *See, e.g., Fleurinor* v. *INS*, 585 F.2d 129, 132, 134 (5th Cir. 1978); *Martineau* v. *INS*, 556 F.2d 306 (7th Cir. 1977) (per curiam); *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977); *Zamora* v. *INS*, 534 F.2d 1055, 1058, 1063 (2d Cir. 1976). Nevertheless, relying on *Stevic* v. *Sava*, 678 F.2d 401 (2d Cir. 1982), petitioner contends that this consensus was upset by the passage of the Refugee Act of 1980. We now examine that legislation to determine whether it produced a significant change.

IV.

The Refugee Act adds to the Immigration Act a new definition of "refugee" as, *inter alia*, any person who has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The legislative history shows that the House and Senate added that definition to conform the language of the Immigration and Nationality Act to the language of the Protocol.

> The Committee Amendment provides a new definition of the term "refugee" which will be added to the Immigration and Nationality Act. The first part of the definition essentially conforms to that

used under the United Nations Convention and Protocol Relating to the Status of Refugees.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

> The bill provides a new statutory definition of a refugee which will be added to the Immigration and Nationality Act. . . . [T]he new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees . . . .

S. Rep. No. 256, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 144.

The Refugee Act also modifies § 243(h) so that an alien is eligible for withholding of deportation if he can show that his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (Supp. IV 1980).[6]

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[6] The prior version of § 243(h) provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976) (amended 1980).

As amended by the Refugee Act of 1980, the section states in relevant part:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1) Supp. IV (1980).

Like the adoption of the new definition of "refugee," the modification of § 243(h) was effected solely for the sake of clarity so that its language would conform more closely with the language of the Protocol. In modifying § 243(h), the House clearly understood that the standards under § 243(h) and under the Protocol were the same.

> Related to Article 33 [the portion of the Protocol that prohibits the expulsion of a "refugee"] is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.
>
> *Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention.* This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979) (emphasis added).

The government on this appeal advises us that the Board, in determining eligibility for withholding of deportation, has continued to use the same analysis that it used prior to the passage of the Refugee Act,

and that the Board continues to view as interchangeable the terms "clear probability" and "well-founded fear" to describe that analysis. *See In re Martinez-Romero*, Interim Dec. No. 2872 (BIA 1981); *In re Lam*, Interim Dec. No. 2857 (BIA 1981). Under this analysis the Board takes into consideration an alien's apprehensions of persecution, but also requires him to produce objective evidence which demonstrates the realistic likelihood that he, or a class to which he belongs, will be persecuted. Generalized, undocumented fears of persecution or political upheaval which affect a country's general populace are insufficient bases for withholding deportation under § 243 (h). *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA 1981).

Notwithstanding the foregoing, the Second Circuit in *Stevic* v. *Sava*, 678 F.2d 401 (2d Cir. 1982), concluded that the Refugee Act has in fact produced a change in the burden of proof. Because petitioner's argument depends on that case, we now turn to analysis of the Second Circuit's reasoning.

V.

Acknowledging that "the matter is hardly free from doubt," *id.* at 404, the *Stevic* court charted the evolution of the phrases in issue. It noted that prior to the 1968 accession to the United Nations Protocol, the INS had employed the "clear probability" standard in regard to deportable aliens under § 243(h), but, under § 203(a)(7) (repealed 1980), had applied a less stringent standard, "good reason to fear," when considering admission of aliens not already in this country. *In re Tan*, 12 I. & N. Dec. 564 (BIA 1967). The Protocol's definition of "refugee"—a person having a "well-founded fear of being persecuted"—was,

in the *Stevic* court's view, "considerably more generous that the 'clear probability' test," 678 F.2d at 405, and more closely resembled the standard used under § 203(a)(7). Turning its attention to developments between 1968 to 1980, the court focused on "suggestions" that modification of practice under § 243(h) might be required by the Protocol: a statement in *Dunar* that procedures would be "substantially" unaffected and that minor changes could be handled administratively; and the statement of the Secretary of State that Article 33 was "comparable" to §243(h). The court in *Stevic* faulted the Board's *Dunar* opinion:

> Ignoring that its own case law had consistently differentiated between Section 203(a)(7)'s "good reason" test and Section 243(h)'s "clear probability" requirement, the BIA leapt illogically from the proposition that "good reason" includes objective factors as well as an applicant's subjective beliefs to the conclusion that it was the same test as "clear probability."

678 F.2d at 407. Acknowledging that *Kashani* had equated the two tests, the *Stevic* court noted that the Fifth Circuit in *Coriolan* v. *INS*, 559 F.2d 993 (5th Cir. 1977), had stated that the Protocol, while not profoundly altering the law, " 'reflects or even *augments* the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law.' " 678 F.2d at 407 (quoting 559 F.2d at 997).

Finally, the court gauged the effect of the Refugee Act of 1980. It observed that the addition of the definition of "refugee," the modification of § 243(h), and other changes tending to eliminate disparity in procedures were effected at a time when Congress was acutely aware of the plight of "boat people." The

court concluded that the adoption of the Protocol's definition of "refugee" eliminated the distinction between the standards that had been applied in §§ 243 (h) and 203(a)(7), and that if only one standard could be used, Congress would seek to employ the more humanitarian standard.

Upon examining the opinion in *Stevic*, we conclude that the court erred. First, it attributed a stringency to the phrase "clear probability" that was not consistent with its own observation in *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), that, under the "clear probability" standard, "[i]n order to forestall deportation the aliens must show some evidence indicating they would be subject to persecution," a formulation that closely approximates the *Dunar* definition of "well founded fear" as "realistic likelihood of persecution." 14 I. & N. Dec. at 319. Second, the court failed to appreciate the caselaw consensus, discussed *supra*, that the two standards were equivalent. Third, the court apparently misapprehended the legislative history of the 1968 accession to the Protocol and of the Refugee Act. As we have noted above and as the *Stevic* court itself acknowledged, Congress was repeatedly assured that accession to the Protocol would not enlarge or alter the effect of existing immigration laws. The Refugee Act's adoption of the Protocol's definition of "refugee" and the modification of § 243(h), as we have seen, were made solely for the sake of clarity. Conceding that the Senate report stated that the amendment to § 243(h) worked "no major change," the *Stevic* court described the House report as "ambiguous." We perceive no ambiguity in the House Committee's statement:

> Although [Section 243(h)] has been held by court and administrative decisions to accord to

> aliens the protection required under Article 33 [of the Protocol], the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979). The legislative history points in one direction only: the modification of § 243(h) was effected merely to conform the language to that of the Convention and Protocol. This was merely cosmetic surgery, for in operation INS procedures under the old § 243(h) had been held to conform.

In our view, the *Kashani* conclusion that there is no difference in the Board's burden of proof formulation whether labeled "clear probability" or "well-founded fear" of persecution survives the Refugee Act of 1980. We reject a view that would "make a fortress out of a dictionary," *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). A word or a phrase "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.). We read "well-founded fear" within the circumstances of its use and hold that it equates with "clear probability."

VI.

Applying these legal precepts to the facts brought before us by this petition for review, we hold that the Board did not err in denying the motions to reopen. Petitioner presented to the Board only his conjecture that he would be faced with induction into the military if he was returned to Iran, and that, because war was repugnant to his personal beliefs, he

would refuse induction and therefore suffer persecution. None of these allegations was supported by affidavit or any other form of proof. Therefore, we must conclude that petitioner did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land. The "probability of persecution" is not "clear"; the "fear of persecution" is not "well-founded."

VII.

The petition for review at 81-2375 will be dismissed for lack of jurisdiction. The petition for review at 82-3195 will be denied.

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